Nos. 87-1303, 87-1310

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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JOINT BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Did the great disparities in real property assessment established on the record below, which resulted from a West Virginia county's policy of relying exclusively on recent sales prices in arriving at the value of property—without adjusting the assessment of unsold comparable properties to reflect current value—violate petitioners' rights under the Equal Protection Clause?

2. Did the court below err in denying taxpayers subject to this discriminatory treatment any reduction in the assessment of their property, on the ground that they should instead seek to raise the assessments of all other comparable properties in the county, contrary to the holdings of this Court in *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), and other cases?

PARTIES TO THE PROCEEDINGS

Petitioner in No. 87-1303 is Allegheny Pittsburgh Coal Company ("Allegheny Pittsburgh"). Petitioners in No. 87-1310 are East Kentucky Energy Corporation ("East Kentucky Energy"), Oneida Coal Company, Inc. ("Oneida"), and Shamrock Coal Company, Inc. ("Shamrock"). Petitioners were appellees before the West Virginia Supreme Court of Appeals and petitioners before the Webster County Circuit Court. Pursuant to Supreme Court Rule 28.1, a list of parents, subsidiaries, and affiliates of petitioners appears at page ii of the petition for certiorari in No. 87-1303 and at Appendix J of the petition for certiorari in No. 87-1310.

Respondent County Commission of Webster County, West Virginia, is the official entity that confirmed the challenged assessments of petitioners' property.

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OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at —— W. Va. ——, 360 S.E.2d 560, and is reprinted in the appendix to the petitions for certiorari ("Pet. App.") at 1a.[1] The pertinent orders

[1] This Court has consolidated Nos. 87-1303 and 87-1310. The appendices to the separate petitions for certiorari reproduce in identical fashion most of the orders and opinions below. Thus, a

and opinions of the Circuit Court of Webster County (Cline, J.), consolidated for purposes of appeal, are unreported and are reprinted at AP Pet. App. 15a-57a and EKE Pet. App. 15a-89a. The orders of the County Commission of Webster County, sitting as a Board of Equalization and Review, are unreported and are reprinted at AP Pet. App. 58a-69a and EKE Pet. App. 90a-104a.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on July 17, 1987. Pet. App. 12a. That court entered an order denying a timely-filed petition for rehearing on November 10, 1987. Pet. App. 14a. The petition for certiorari was filed in No. 87-1303 on February 4, 1988, and in No. 87-1310 on February 5, 1988. This Court granted the petitions and consolidated the cases on March 28, 1988. 108 S. Ct. 1268-69. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

The provisions of the Constitution of West Virginia and the West Virginia Code involved in this case are: W. Va. Const. art. X, §§ 1 & 1b; W. Va. Code §§ 11-3-1

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reference to "Pet. App." may be found at the same page in the appendix to either petition. Where an order or other matter is reproduced in only one of those appendices, the reference to the appendix to the petition in No. 87-1303 will appear as "AP Pet. App." and to the appendix to the petition in No. 87-1310 as "EKE Pet. App."

& 11-3-25; and W. Va. Code § 18-9A-11. These provisions are set forth at AP Pet. App. 70a-87a.

STATEMENT OF THE CASE

Since 1976 petitioners have pursued relief before the County Commission of Webster County, West Virginia, and in the courts of that state, seeking to remedy a pattern of blatant discrimination in the methods of real property appraisal and assessment employed by the Webster County Assessor. Finally, in December 1985 and February 1986, the Circuit Court for Webster County issued opinions and orders finding that the Webster County Assessor had for years violated the dictates of the state and federal constitutions in her methods of appraising real property, resulting in petitioners having been required to pay a wildly disproportionate share of the County's property tax burden. The Circuit Court ordered that the appraisals and assessments on petitioners' property be reduced and substantial refunds paid.

The County Commission appealed the Circuit Court's rulings. By a three-to-two margin, the West Virginia Supreme Court of Appeals reversed, holding that the system of property tax assessment employed by the Webster County Assessor did not violate the West Virginia Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Webster County's System Of Property Tax Assessment

This case concerns an *ad valorem* tax on the ownership of real property. Since the amount of this tax is based on the value of property, it is necessary to ascertain the value of the different parcels of property subject to the tax. Once this appraisal process is complete and the appraised value of a particular parcel is established, an appropriate percentage is applied to arrive at the "assessed value." The tax is then levied as a percentage of the assessed value of the property.

West Virginia statutes and constitutional provisions outline a detailed scheme for the appraisal and assessment of real property for purposes of local taxation. *See* AP Pet. App. 70a-87a. Taxes are levied based on a uniform assessment percentage of the "true and actual value" of property. W. Va. Const. art. X, § 1b, W. Va. Code § 11-3-1. During most of the years at issue in this case, the Webster County Assessor assessed all real property within the County at 50 percent of its appraised value.[2] The questions presented here involve the constitutionality of the method by which the Assessor arrived at the appraised values of properties within the County. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. The unconstitutional discrimination found by the Circuit Court and the two dissenters in the West Virginia Supreme Court of Appeals resides in the initial determination of the value of the property.

To assist county assessors in making that determination, the State Tax Commissioner of West Virginia periodically publishes a state-wide appraisal for use in evaluating all classes of property. By statutory command, this appraisal is to be "delivered to the assessor and county commission [of each county]," and those local officials "shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property." W. Va. Code § 18-9A-11(f). During the years in question, the State Tax Commissioner determined a baseline appraised value for petitioners' property in Webster County to be $360 per acre, yielding an assessed value of $180 per acre. *See* Pet. App. 46a.

Contrary to West Virginia law, the Webster County Assessor *never used* the State Tax Commissioner's guide.

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[2] Today, all property in the State is assessed at 60 percent of its appraised value. W. Va. Const. art. X, § 1b.

The County Commission, sitting as a Board of Equalization and Review, never used that document either. Instead, the Circuit Court found that the Webster County Assessor, after receipt of the state-wide appraisal, "placed [it] in a drawer where it remained unused and abandoned until the day of the hearing" before the Circuit Court. Pet. App. 34a.

The alternative system adopted as policy by the Webster County Assessor, and approved over the years by the County Commission, was quite simple: "all recently transferred property was uniformly and equally assessed at fifty per cent (now sixty) of the value declared in the most recent deed of conveyance to a taxpayer." Pet. App. 27a. So long as the property was not subject to recent sale, it was carried on the tax rolls with the same assessment it had borne in prior years, with only occasional *de minimis* adjustments. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a. As a result of this assessment system, recently-conveyed property was assessed on the basis of its actual current value, while other comparable property was assessed, and therefore taxed, at a much lower level.

The Challenged Assessments

In 1974 Allegheny Pittsburgh purchased some 7300 acres of Webster County coal property. The purchase price for this property was $24,624,500. Pet. App. 3a. In 1975 this property was assessed at a little less than $500,000. Effective in 1976, however, when the Assessor first took into account the conveyance to Allegheny Pittsburgh, the assessment was raised to $12,312,250, or precisely 50 percent of the purchase price reflected in the deeds. This assessment of nearly $1,700 per acre created a one-year increase in Allegheny Pittsburgh's property taxes of over 2,500 percent. Despite filing repeated petitions for relief with the County Commission, Allegheny Pittsburgh's property remained assessed at this level for each tax year between 1976 and 1983.

In July 1982, Allegheny Pittsburgh sold its Webster County property to East Kentucky Energy for a purchase price of $29,842,500. In 1984, the Webster County Assessor first took note of this sale, and raised the assessment on the property to 50 percent of the purchase price —$14,921,250—or a little over $2,000 per acre. Pet. App. 3a. For the years 1984 through 1986, East Kentucky Energy protested this assessment to the County Commission, to no avail.

In 1977, Shamrock purchased 7,783 acres of Webster County coal land, as part of a larger transaction in which it purchased coal property, coal leases and options located in Nicholas County, Braxton County, and Webster County. The total purchase price for all the land, leases and options was $10,000,000. The Webster County Assessor appraised the Webster County portion of the property purchased by Shamrock at $5,867,600, based on the ratio of the Webster County acreage to the total acreage Shamrock purchased. In 1981, Shamrock conveyed the property to Oneida, a sister corporation, without cash consideration. For all years between 1981 and 1986 the Shamrock-Oneida property was assessed at $2,933,800, or 50 percent of the County Assessor's calculation of the deed value. EKE Pet. App. 52a-54a. Shamrock and Oneida objected to this assessment, but the County Commission denied all relief.

If the Webster County Assessor had utilized the State Tax Commissioner's Guide, the assessed value of petitioners' properties would have been $180 per acre. Instead, Allegheny Pittsburgh paid property taxes for the years 1976 through 1982 on an average assessment of $1,688.64 per acre; East Kentucky Energy was assessed at the same rate in 1983 and, beginning in 1984, at an average rate of $2,043 per acre; and Shamrock and Oneida were taxed during the years 1981 through 1986 on an average assessment of $376.95 per acre. As became clear during the course of petitioners' challenges, however, this deviation

from the state-wide appraisal was only the beginning of the story, since other comparable property in Webster County was appraised and assessed at levels far *below* those set in the State Tax Commissioner's Guide.

The Circuit Court's Rulings

All of the petitioner taxpayers filed protests with the County Commission of Webster County, which sat as a Board of Equalization and Review, *see* W. Va. Code § 11-3-25, contending that the assessments on their property were unconstitutional and discriminatory. They specifically claimed, for example, that the County Assessor "employed a systematic plan of assessing property whereby [petitioners'] assessments have been greatly increased and other property owners in the same class in the same location are intentionally omitted [from such increases]."[3] Consistently, over a period of ten years, the County Commission refused to grant petitioners any relief. *See* AP Pet. App. 58a-69a; EKE Pet. App. 90a-104a.

Each year petitioners filed appeals with the Circuit Court for Webster County, seeking review of the County Commission's decisions. All appeals for the years 1976 through 1985 on the Allegheny Pittsburgh-East Kentucky Energy property eventually were consolidated by Circuit Court Judge Danny O. Cline and decided in an Order entered on November 22, 1985. Pet. App. 15a. The appeals of Shamrock and Oneida, based on 1981 through 1985 assessments, were consolidated and decided by Judge Cline on February 13, 1986. EKE Pet. App. 49a. Judge Cline held that the system of real property assessment used by the Webster County Assessor systematically and intentionally discriminated against petitioners in violation of both the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. He

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[3] Allegheny Pittsburgh Application to Webster County Commission for 1976, at 2.

ordered the County Commission to reduce the assessments on petitioners' properties to the levels set by the State Tax Commissioner. Pet. App. 43a, 46a-47a; EKE Pet. App. 74a-75a, 78a.[4]

Judge Cline based his holding of unconstitutional discrimination on a detailed examination of the record created in years of proceedings before the County Commission. Central to his holding was a comparison of the assessments on petitioners' property with the assessments on neighboring parcels of coal property that he found to be comparable in all respects. *See* Pet. App. 21a-22a. The Circuit Court specifically found that "petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." Pet. App. 16a; *see* EKE Pet. App. 50a. The court concluded that "it is obvious that the real estate of the petitioners and that of contiguous, adjoining and adjacent landholders to which it is compared is substantially the same." Pet. App. 29a.[5]

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[4] This reduction in assessments entitled petitioner Allegheny Pittsburgh to a tax refund, exclusive of interest, totalling over $1.2 million. Oneida-Shamrock is entitled to a similar refund of some $100,000. East Kentucky Energy, pursuant to interim Circuit Court orders, paid taxes based on the assessments in the State Tax Commissioner's Guide, and thus no refunds were necessary for it. In subsequent orders, Judge Cline made his rulings applicable to the 1986 assessments on the East Kentucky Energy and Oneida property. EKE Pet. App. 83a-89a.

[5] Respondent stipulated below to the admission of lists of comparable properties. *See* Pet. App. 21a, 24a, 29a; EKE Pet. App. 90a. In particular, respondent stipulated that "[t]he properties surrounding the property owned by [East Kentucky Energy], located on Exhibit A and listed on Exhibit B are comparable properties in that they are substantially the same geologically as the properties of [East Kentucky Energy], the subject matter of this action." Stipulation (Feb. 10, 1984), at ¶ 6; Stipulation (Feb. 15, 1984), at ¶ 10.

In the case of the Allegheny Pittsburgh-East Kentucky Energy properties, Judge Cline found that the property had been assessed on an average per acre basis of $35.88 in 1975, but was raised to an average assessment of $1,688.64 per acre in 1976, and was increased again to $2,043 per acre in 1984. By contrast, nine comparable properties (identified in Trial Exhibit B) were assessed at an average rate per acre of $27.38 in 1975, $48.15 in 1976, and $62.15 in 1984. Pet. App. 24a. Fifty additional parcels (identified in Trial Exhibit G) that the court found to be "substantially similar to petitioner's real estate" had been assessed at an average rate per acre of $27.95 in 1975, $53.20 in 1982, and $58.31 in 1984. Pet. App. 24a-25a. Thus, for the years 1976 through 1982, Allegheny Pittsburgh was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties. For the years 1984 through 1986, East Kentucky Energy was assessed and taxed at approximately 33 times the rate applied to owners of comparable properties.[6]

Comparing the respective increases in assessment of the Allegheny Pittsburgh-East Kentucky Energy property and the comparables, the Circuit Court concluded that

> the evidence presented clearly and convincingly establishes that the assessor, and the Board of Equalization and Review, in sustaining the questioned assessments, have, over a period of ten years, systematically and intentionally assessed the petitioners' real estate, and consequently levied taxes against petitioners' real estate, at a weighted rate per acre of from 5,672.56 to 6,511.06 percent in excess of the weighted rate per acre assessment applied to com-

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[6] These ratios are based on the assessed values of petitioners' property in 1976 and 1984, as compared to the average assessed values of the Exhibit B comparables in those years. If one uses the larger sample of properties contained in Exhibit G, the ratios are 32 to 1 for Allegheny Pittsburgh and 35 to 1 for East Kentucky Energy.

parable real estate owned by others and located adjacent, contiguous or near that of petitioners. [Pet. App. 40a.]

The facts found by the Circuit Court with respect to the Oneida-Shamrock properties were less dramatic, but the evidence of discriminatory assessment was no less compelling. The Oneida-Shamrock properties were assessed at an average rate of $376.95 per acre for the years 1981 through 1985. The court examined several representative 1983 assessments of coal property located in the same magisterial districts of the County, and found that all those assessments were at much lower levels. Those 1983 assessments, which the Court found to be "generally indicative of the assessment of Webster County coal tracts during the period in question," were at levels of $21.99 per acre, $48.55 per acre, $19.21 per acre, $22.00 per acre, $24.20 per acre, $21.98 per acre, and $22.00 per acre. *See* EKE Pet. App. 60a-61a. Based on these figures, Shamrock and Oneida were assessed and taxed at a rate of from 8 to 20 times the rate applied to owners of comparable neighboring coal properties.[7]

The Circuit Court specifically determined that these arresting disparities between the assessments of petitioners' property and those of comparable properties owned by others could *not* be traced to any distinguishing characteristics or unique features of petitioners' property:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.

[7] The 20 to 1 ratio is based on the 1983 assessment of a 1,000 acre tract at $19.21 per acre. The 8 to 1 ratio is based on the 1983 assessment of an 8,500 acre tract at $48.55 per acre. *See* EKE Pet. App. 60a.

> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, location, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the real estate listed in the Exhibit B or G comparables. [Pet. App. 29a; *see* EKE Pet. App. 59a.]

No distinguishing characteristics could explain the disparity in assessments because "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; EKE Pet. App. 59a. As the Circuit Court noted, "[u]pon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a; EKE Pet. App. 59a. On the contrary, it was undisputed below that "[t]he sole basis for the assessment of petitioners' real estate was, according to the assessor, the consideration declared in petitioners' deeds." Pet. App. 29a; EKE Pet. App. 59a.

To be sure, the Circuit Court recognized that there was nothing inherently wrong with an assessor's use of recent sales data as the basis for appraising real property. But the court held that the Webster County Assessor's failure to use recent sales data to determine the current market value of all property—including property that had *not* been recently conveyed—led to a discriminatory and unconstitutional result:

> [I]f the assessor elects to use recent sales as the basis for the assessment of real estate, he is obligated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal and uniform clause of Section 1, Article X, of the West Virginia Constitution to base the real estate assessments of substantially similar real

> estate, whether owned by a corporation or an individual, upon the same or a similar value, depending on certain variables, even though the real estate has not been the subject of a recent conveyance. [Pet. App. 42a; *see* EKE Pet. App. 74a.]

The County Assessor's method of assessing *only* properties recently conveyed at their current market value was, according to the Circuit Court, applied "intentionally and systematically." Pet. App. 42a-43a; EKE Pet. App. 74a. Moreover, the County Commission, sitting as a Board of Equalization and Review, had intentionally failed to correct the Assessor's discriminatory practices:

> The evidence further shows, and the Court so finds, that the inequality of the assessment of petitioners' real estate and that of comparable tracts has been repeatedly brought to the attention of the assessor and the Board of Equalization and Review over the ten year period involved.
>
> The evidence also demonstrates, and the Court finds, that as petitioners have repeatedly and consistently protested the inequality of the assessment of their real estate, as compared to the assessments of comparable real estate owned by others, the assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize petitioners[']assessment downward or to equalize the real estate assessments of others upward, though petitioners[] have requested relief in both directions. [Pet. App. 40a-41a; *see* EKE Pet. App. 72a-73a.]

The Circuit Court chose to reduce the disparity in assessments by lowering the assessed values of petitioners' property to an average of $180 per acre (50 percent of the appraised value set by the State Tax Commissioner's Guide).[8] The court considered but rejected the alterna-

[8] The Circuit Court rejected out of hand the County Commission's argument that, over time, the assessments would be equalized by adjustments to the assessed values on county property not subject to recent sale. The court found that if the Assessor continued her pattern of occasional *de minimis* adjustments in unsold property and adjustments were *not* made to the assessments on petitioners' property, it would take *over 500 years* before comparable nearby properties were assessed at the 1984 rates applied to East Kentucky Energy's property. *See* Pet. App. 28a. If, on the other hand, "increased assessments [were] uniformly applied [to all county property] in the future[,] equalization would * * * never be accomplished. In fact, the difference between the assessments would become greater, not less." Pet. App. 28a. *See* EKE Pet. App. 58a.

tive remedy of increasing the assessments on neighboring properties to the levels set by the Assessor for petitioners' property, noting that the extraordinary adverse financial impact on neighboring landowners would have been too severe for many of them to bear. *See* Pet. App. 43a-44a; EKE Pet. App. 75a-76a.

The Decision Below

The County Commission appealed the Circuit Court's orders to the West Virginia Supreme Court of Appeals. The appeals were consolidated, and the Supreme Court of Appeals reversed the Circuit Court's judgment by a narrow margin of three to two.[9]

The unsigned per curiam opinion of the majority concluded that the consideration recited in petitioners' deeds reflected the true and actual value of their property, that the undervaluation of neighboring properties in Webster County was not "intentional and systematic," and that the only remedy available to these taxpayers was to seek to have the County Commission raise the assessments of other taxpayers' property, rather than lower their own. *See* Pet. App. 7a-9a.

[9] When the judgment of the court was announced on July 17, 1987, it indicated that only Justice Brotherton dissented. Pet. App. 13a. When Justice Brotherton's dissenting opinion was published on September 18, 1987, however, it stated that Justice Neely joined in the dissent. Pet. App. 11a.

The majority recognized that the issue was whether the "assessments violated the equal and uniform clause of * * * the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Pet. App. 4a. The court first held that "the consideration paid by the [petitioners] represents the 'true and actual value' of their respective properties as set by the board of review." Pet. App. 7a. Then, citing the general rule that assessments are presumed to be correct, the court stated, without further elaboration, that "the record does not support the trial court's ruling that the actions of the assessor and board of review constitute 'intentional and systematic' discrimination." Pet. App. 8a. Finally, referring to two of its own prior decisions, the court held that if petitioners were aggrieved by the overassessment of their property in relation to comparable property owned by others, " 'they should seek to have the assessments of other taxpayers raised to market value.' " Pet. App. 9a (*quoting Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 709 (W. Va. 1982)).

The court reversed the judgments of the Circuit Court and remanded the case for reinstatement of the Assessor's original assessments on petitioners' property for all the years in question. Pet. App. 10a.

Justice Brotherton dissented, in an opinion joined by Justice Neely. *See* footnote 9 *supra*. The dissenters concluded that "the tail is now wagging the dog in West Virginia property taxation." Pet. App. 10a. The dissenters had no quarrel with the majority's holding that recent deed consideration is reliable evidence of a property's actual value, but argued that "the question of true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." Pet. App. 10a (emphasis in original). Viewing the record evidence, the dissenters concluded:

> There is neither equality nor uniformity when recent purchasers of property must pay tax based on current value while all other property owners pay tax based on low, outdated assessed values. Where, as in this case, the assessor has made only token attempts to bring similar property up to current value, the assessor is intentionally and systematically undervaluing the other property in violation of Article X, § 1 of the West Virginia Constitution. [Pet. App. 10a.]

The dissenters recognized "the need for improving the educational system in West Virginia," [10] but argued that "this improvement cannot constitutionally be achieved at the expense of a few taxpayers." Pet. App. 10a.

There is no question that the judgment of the West Virginia Supreme Court of Appeals necessarily decided the federal questions presented by petitioners. The Circuit Court concluded that the discriminatory assessments of petitioners' property violated both the West Virginia Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Pet. App. 43a; EKE Pet. App. 74a ("the assessor and Board of Equalization and Review violated the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution"). The West Virginia Supreme Court's reversal of the Circuit Court necessarily entailed a reversal of that court's holding based on the Fourteenth Amendment. Indeed, the Supreme Court opinion itself recognized that petitioners "argue that the primary issue presented by this case is whether the assessments of their property

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[10] Property taxes in West Virginia are used primarily for funding the public schools. *See* W. Va. Const. art. X, § 1b (Subsection E); Farber, *Limitations on Property Taxation in West Virginia: A Method Through the Madness*, 4 W. Va. Pub. Interest L. Rep. 1, 10 (1982).

and comparable properties are equal and uniform under the United States and West Virginia Constitutions." Pet. App. 5a.[11]

SUMMARY OF ARGUMENT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation, but no amount of deference or accommodation for questions of judgment can overlook the nature of the discrimination in this case or its startling magnitude. The property owned by petitioners was appraised—and therefore assessed and taxed—at a dramatically higher level than property owned by others that was comparable in every respect. The findings of the Circuit Court, undisturbed on appeal, established that the average assessed value of petitioners' property was as much as *5 times* the average assessed value of comparable property owned by others. Pet. App. 16a, 21a-25a.

This disparity did not result from errors in judgment, the exercise of discretion, or classification by the State among different types of property. It resulted from a discriminatory appraisal plan, deliberately adopted as policy by the Webster County Assessor, and sustained by the Webster County Commission.

The court below did not dispute the disparities established on the record, but concluded that the actions of the Assessor and County Commission were constitutionally acceptable because they did not constitute "intentional and systematic" discrimination. Pet. App. 8a. Although the court below did not explain this legal conclu-

[11] While both the majority and the dissent below articulated their reasoning with reference to the "equal and uniform" clause of the state constitution, W. Va. Const. art. X, § 1, the West Virginia Supreme Court has equated the requirements of that provision with those of the Fourteenth Amendment Equal Protection Clause, holding that both turn on the question whether discrimination in assessments is "intentional and systematic." *See Kline* v. *McCloud*, 326 S.E.2d 715, 724 (W. Va. 1984).

sion, it apparently ruled that petitioners were not subject to intentional and systematic discrimination because their property was not assessed at more than its actual value, and because they were free to seek to raise the assessments of any relatively undervalued properties owned by others. Pet. App. 7a-9a.

This Court has clearly held, however, that the fact that a given taxpayer's property is assessed at its actual value is no defense to an equal protection challenge to the lower assessment of comparable property. As Justice Brandeis noted for the Court in *Southern Railway* v. *Watts*, 260 U.S. 519, 526 (1923), "[t]he rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others." It is equally well established that a taxpayer who is subject to such discriminatory assessment cannot be relegated to attempting to raise the assessments of comparable properties owned by other taxpayers. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623-624 (1946); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 446 (1923). To quote Justice Brandeis again, writing for the Court, "a taxpayer who has been subjected to discriminatory taxation * * * cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. at 247.

This Court has also held that disparate taxation is "intentional and systematic"—and thus in violation of the Fourteenth Amendment—when clearly disparate assessments are "made pursuant to a deliberately adopted system," and result not from possible errors of judgment but from the system itself. *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25 (1931). Here, there is no dispute that the disparate assessments were caused by

the Assessor's deliberate policy of reassessing recently purchased property at the purchase price, and not reassessing unsold comparable property to reflect current value.

The command of the Equal Protection Clause is that those who are similarly situated be treated similarly. There can be no question that petitioners and their neighbors in Webster County are similarly situated for purposes of *ad valorem* property taxation. West Virginia does not distinguish among types of property for purposes of appraisal and assessment, and the Circuit Court unambiguously found that petitioners' property was "substantially similar" to neighboring property "in topography, location, access, development, mineral content and forestation." Pet. App. 16a. Yet petitioners and their neighbors are *not* treated similarly for property tax purposes. Because of the appraisal policy deliberately adopted by the Assessor and County Commission, petitioners' property was appraised, assessed, and taxed at levels many times greater than that of comparable property owned by others. This discriminatory appraisal system favored the "friends and neighbors" of the elected county officials responsible for the policy, at the expense of newcomers like petitioners. Pet. App. 40a. The resulting dramatic discrimination should not be condoned by this Court.

ARGUMENT

I. The Record Establishes Discriminatory Taxation In Violation Of The Equal Protection Clause

This Court has long recognized that "the equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough* v. *Cromwell*, 326 U.S. at 623. Discriminatory treatment can inhere not only in disparate rates of taxation, but also in the disparate appraisal or assessment of comparable property subject to the same tax rate. Given two comparable parcels of property assessed at $1,000, taxing one at 5 percent, for a tax of $50, and the other at 10 percent, for a tax of $100, would clearly contravene the constitutional guarantee of equal treatment. The same result obtains, both as a practical and a constitutional matter, if a uniform 10 percent rate is applied to both parcels, but one is assessed for tax purposes at $500, yielding a tax of $50, while the other—comparable in every pertinent respect—is assessed at $1,000, yielding a tax of $100.

The discrimination in this hypothetical pales before the facts of this case. Because of the approach to property appraisal deliberately adopted as the policy of Webster County, petitioners' property was appraised, assessed, and taxed not at twice but up to *35 times* the level of other comparable property in the county. Under such circumstances, the fact that a uniform assessment percentage is applied to the discriminatory appraised values, or that petitioners' property is not appraised at more than its actual value, cannot save the taxing scheme.

In the proceedings below, and in this Court, respondent has advanced the unfounded notion that the Webster County Assessor applied a uniform method of as-

sessment to all property owners. *See* Pet. App. 6a; Resp. Br. in Opp. 10-12. This argument proceeds from the following syllogism: All assessments are based on 50 percent of appraised value. The consideration stated in the deeds for all property recently conveyed is used by the Assessor to establish the appraised value of that property. Therefore, the system of assessment is equal and uniform.

The obvious flaw in respondent's logic is that it fails to take into account the fact that most property in Webster County has *not* been recently conveyed. In the words of Justice Brotherton in dissent below, most property owners pay taxes based on "low, outdated assessed values," Pet. App. 10a, and the Assessor has refused to use evidence of recent sales or any other information to arrive at a current market value for properties that have not changed hands for many years. *See* Pet. App. 42a.

In effect, the County Assessor has created a dual system of property tax assessment. Those landowners who have held their property for years have their land appraised at a small fraction of its current value. Those landowners who are newcomers to Webster County have their land appraised at its current fair market value.[12]

In *Cumberland Coal Co.* v. *Board of Revision*, *supra*, this Court was confronted with a challenge to the assessment of coal property by the assessor and the commis-

[12] This assessment practice has been referred to as the "welcome stranger" approach. *See, e.g.*, Comment, *Hellerstein v. Assessor of the Town of Islip: A Response to Inequities in Real Property Assessments in New York*, 27 Syracuse L. Rev. 1045, 1061 (1976) ("newly-acquired parcels, although they may be equivalent in value to the long-held parcels, are assessed for a higher amount due to appreciation of land values. The 'new' owner—the 'stranger'—will pay higher taxes proportionately than the owner of a long-held parcel who 'welcomes' the fact that he consequently pays lower taxes").

sion of Greene County, Pennsylvania. The system of assessment at issue in that case was one in which the assessor appraised all coal-bearing land at the same rate per acre. He then applied a uniform rate of assessment of 50 percent to the appraised value to arrive at the assessments. The Cumberland Coal Company challenged the system based on the indisputable fact that veins of coal located in areas that were remote and inaccessible were far less valuable than coal deposits located in close proximity to rail or river transportation. Thus, the company claimed that uniform valuation of property discriminated in favor of those landowners whose coal property was more valuable because of its ready accessibility to means of transportation, and discriminated against those whose coal property was land-locked. This Court concluded, in a unanimous opinion, that the challenged system of assesment violated the Equal Protection Clause.

In reaching its holding, the *Cumberland Coal* Court squarely rejected the argument, renewed more than fifty years later by the respondent here, that the fact that all coal-bearing property was assessed uniformly at 50 percent of its value immunized the tax scheme from constitutional attack:

> In applying [equal protection] principle[s], the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as for example, an acre) as the property of other owners which has an actual value admittedly higher. *Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.* [284 U.S. at 29 (emphasis supplied).]

This Court reiterated the point in *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933), stating that "where a statute lays a tax upon property *ad valorem* at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property."

Respondent also argued below that so long as the assessments on petitioners' property fairly reflected the true value of that property, petitioners could not complain of discrimination. The court below seemed to accept this argument, emphasizing that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of [petitioners'] property." Pet. App. 8a. Regardless of whether this is true, it is wholly irrelevant to the equal protection claim at issue. The point is that comparable property owned by others is not assessed on the basis of *its* actual value, but at a far lower level. As the dissenting justices point out below, "the quest for true value [cannot] override the *constitutional* requirement that taxation be equal and uniform." Pet. App. 10a (emphasis in original).

At least since the decision in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 352-353 (1918), it has been "regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *See, e.g., Southern Railway* v. *Watts*, 260 U.S. at 526; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 445-446; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. at 247; *Hillsborough* v. *Cromwell*, 326 U.S. at 624.[13]

[13] *See also Southland Mall, Inc.* v. *Garner*, 455 F.2d 887, 889 (6th Cir. 1972) ("[i]n order to establish an equal protection violation it is not necessary for a taxpayer to prove that he was overassessed[;] [h]e may instead show that his property was assessed at its true value while other property was intentionally undervalued"); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374, 1375 (1962) ("the Court repeatedly has held that discrimination between parcels within the same class may indeed constitute a denial of equal protection. This requirement of intraclass equality will prevail in any conflict with a state's provision for full-value assessment").

This proposition would seem self-evident from the very nature of the equal protection guarantee, which is concerned not with the substantive terms on which a State taxes but simply that the State not discriminate among similarly situated taxpayers. Indeed, the logic of the court below would find no equal protection violation if a State chose to impose a property tax on only one taxpayer, so long as the tax were not based on more than the actual value of that unfortunate taxpayer's property.

In this case, the Circuit Court found as a fact that properties in all respects comparable to petitioners' were appraised by the County Assessor at low, outdated values, while petitioners' properties were appraised at their current value. That court concluded that the Assessor and County Commission had systematically and intentionally underassessed long-standing "friends and neighbors" at the expense of newcomers to the Webster County tax rolls. Pet. App. 40a; EKE Pet. App. 72a. This was not equal treatment; it was unconstitutional discrimination.

II. The Discriminatory Taxation Is Intentional And Systematic

In considering whether the dramatic disparity in state taxation established on this record contravenes the guarantee of equal protection, it is important to recognize what is *not* at issue in this case. First and foremost, this is not a case involving the reasonableness of classi-

fications under state law among different types of property for tax purposes. West Virginia is free to tax property owned by corporations and property owned by individuals at different levels,[14] and different types of corporations or different types of property at different levels.[15] It presumably could, if it chose, impose a tax on coal property alone, or tax such property at a higher level than other real property in the State. Any such classification for tax purposes carries with it a heavy presumption of validity, and will be sustained so long as it "rests upon some reasonable consideration of difference or policy." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959).

That is not what is at issue here. So far as is pertinent to this case, West Virginia does *not* classify property for tax purposes. Indeed, the West Virginia Constitution specifies that "[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value * * *." W. Va. Const. art. X, § 1.[16] The state constitution further provides that "all property, both real and personal, shall be taxed in proportion to its value," and that "all property subject to ad valorem taxation shall be assessed" at a uniform precentage of its value—currently 60 percent. *Id.* art. X, §§ 1, 1b. Under W. Va. Code § 11-3-1, "[a]ll property shall be assessed annually as of the first day of July *at its true and actual value* * * *" (emphasis supplied).

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[14] *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

[15] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937); *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938).

[16] Distinctions are set forth with respect to maximum tax *rates* on certain personal property used in agriculture, residential property, farms, and property within or outside municipalities. *Id.* None of these is pertinent to this case.

Thus, state law draws no distinctions among property for purposes of appraisal and assessment. On the contrary, it mandates that all property be appraised and assessed on the same basis. The reason that petitioners' property is appraised and assessed—and therefore taxed—at levels many times higher than that of other comparable property is not because the State has chosen to differentiate between the properties for tax purposes, and the reasonableness of any such differentiation is not at issue. State law mandates that petitioners' property and other real property in the State be treated the same—that "*all* property * * * be taxed in proportion to its value," that "*all* property subject to ad valorem taxation * * * be assessed at" a uniform percentage of its value, and that "*all* property * * * be assessed * * * at its true and actual value." W. Va. Const. art. X, §§ 1, 1b; W. Va. Code § 11-3-1 (emphasis supplied).

State law, and the unambiguous and uncontradicted findings of the Circuit Court on comparability, thus resolve in this case what is often the most difficult question in considering an equal protection claim—whether the party discriminated against is "similarly situated" to those treated more favorably. *See Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States"). Here, the State has grouped all real property together for purposes of tax appraisal and assessment, defining the class of those similarly situated.[17]

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[17] This is not to say that a State may not engage in reasonable classification consistent with the Federal Constitution even though state law appears to bar such distinctions. As Justice Frankfurter has remarked, "the Equal Protection Clause is not a command of candor." *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U.S. 362, 369 (1940). The important point is that what is at issue here is not a state effort to distinguish among types of property for tax purposes, but rather a deliberately adopted system which, according to the State, treats property owners equally for purposes of *ad valorem* taxation—even though it results in peti-

Nor is this a case involving any question of the exercise of judgment by an assessor, or any question of a good faith mistake in a particular valuation decision. Courts properly accord considerable deference to valuation decisions, in light of the often complex questions of judgment that surround any effort to ascertain value, and respondent and the court below relied heavily on this principle of deference. *See* Pet. App. 8a. But deference to the judgment of the Assessor is simply not at issue in this case. Petitioners are not suggesting that this Court or any other set itself up as a board of review to second-guess the judgment of assessors concerning the value of particular parcels of property. The dramatic disparity in valuation established as a matter of record here resulted not from any exercise of judgment or discretion by the Assessor, but precisely because the Assessor deliberately elected *not* to exercise *any* judgment or discretion.

The findings of the Circuit Court—undisturbed by the Supreme Court of Appeals—are quite explicit on this point. The Circuit Court found that "the assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; *see* EKE Pet. App. 59a. The disparity in assessments in fact was not based on any arguable differences among the parcels, and the Assessor did not contend that it was.

> The assessor admitted on examination that she did not, in making her appraisement, physically inspect or view the petitioners' real estate, that she had not compared it to adjacent or contiguous tracts, that no scientific examinations or tests had been made or performed, by her or at her request or direction, and that appraisements had not been sought or considered * * *. [Pet. App. 30a.]

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tioners' property bearing a tax burden more than 35 times that of comparable property.

This is thus emphatically not a case in which any question of deference to the judgment of the assessor is involved.[18]

This is also not a case of temporary distortions in equal treatment caused by changes in appraisal methods or cyclical programs of reassessment. Courts generally reject challenges to such temporary disparities, provided that all property will, within a reasonably limited period of time, be subject to reassessment or reappraisal under the new system.[19] Unlawful discrimination will be found, however, if the reappraisal is selective or does not reach all property within a limited time. For example, in *Sparks* v. *McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958), the assessor applied a new formula to determine the value of property on certain streets, resulting in increases in assessments of from 300 to 1600 percent, but simply carried forward the old assessments of other comparable property. The state Supreme Court found that the increased assessments "were made intentionally and systematicaliy" and struck them down as "an intentional overassessment of a portion of a certain class of property in specified areas as compared with assessment of like property in the rest of the county." 84 Ariz. at 286-287, 327 P.2d at 297.

The assessor asserted that he would eventually apply the new formula to all property, but the court held that that fact could not save the unconstitutional discrimination:

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[18] Indeed, it is precisely because the appraisal policy adopted by Webster County abnegates *any* exercise of judgment by the Assessor that the policy is considered unacceptable under professional assessing standards. *See generally* Brief Amicus Curiae of the International Association of Assessing Officers in Support of Petitioners.

[19] *See, e.g., Recanzone* v. *Nevada Tax Comm'n*, 92 Nev. 302, 550 P.2d 401 (1976); *Meyer* v. *Cuyahoga County Board of Revision*, 58 Ohio St. 2d 328, 390 N.E.2d 796 (1979).

> We cannot subscribe to the proposition that grossly inequal values by the use of a specific method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties. [84 Ariz. at 287, 327 P.2d at 297.]

In *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. 609, 592 P.2d 965 (1978), the court rejected a similar claim, noting that at his current pace it would take the assessor 50 to 100 years to reappraise all property in the jurisdiction, and that any "cyclical program of revaluation * * * must be completed within a reasonably limited time." 92 N.M. at 612-613, 592 P.2d at 968-969.

Here, there is not even any question of cyclical reappraisal. In this case only a small segment of property—that which has recently been sold—is reappraised at current value, without *any* plan to subject all property to eventual reappraisal. The record reflects that the Webster County Assessor has for years ignored all relevant indicia of the true value of properties in the County, other than stated deed consideration. When a property within the County is bought and sold, and the assessed value raised as a result, no effort is made to adjust the assessed values of comparable properties lying adjacent to the conveyed property to reflect the demonstrated increase in *their* fair market value. Equalization is not simply "an indefinite number of years in the future"—itself sufficient to establish a constitutional violation—but in fact can *never* occur.[20]

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[20] Indeed, as the Circuit Court noted, even if the assessments of petitioners' property were frozen, it would take *over 500 years* for the *de minimis* increases in the assessments of other comparable property to catch up with petitioners' present assessments. Pet. App. 28a; *see* EKE Pet. App. 58a. *See* footnote 8 *supra*.

Nor is this a case in which the assessor has made an "honest effort" to remedy the effects of disparate assessment following the adoption of a new method of valuation, as in *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. at 353. On this record, gross disparities have continued unremedied for a period of over ten years.

The discrimination established on the record in this case is not the result of state classification, the exercise of judgment by the assessor, or a good faith mistake. It is not the result of mere temporary dislocation due to a cyclical reappraisal program or a change in appraisal methods. The discrimination is rather the result of a deliberately adopted policy. As such, it is clearly a violation of the Fourteenth Amendment.

The majority below, without explanation, concluded that the proven discrimination in the appraised values of real property in Webster County was not unconstitutional because it was not "intentional and systematic." That conclusion was not based on any rejection of the Circuit Court's factual findings. It was instead an erroneous legal conclusion, based on a misunderstanding of what the "intentional and systematic" test requires.

The purpose of the "intentional and systematic" test is to avoid intrusion into state tax practices on the basis of disparities that are occasional and sporadic, or the result of mere errors in judgment. *See Southland Mall, Inc.* v. *Garner*, 455 F.2d at 889. Thus, the early cases establishing the "intentional and systematic" test all drew a distinction between actionable discrimination and mere errors in judgment.[21]

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[21] *See, e.g., Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 447 ("mere errors of judgment do not support a claim of discrimination, but * * * there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity"); *Southern Railway* v. *Watts*, 260 U.S. at 526-527 ("plaintiffs have clearly failed to establish that there was intentional and systematic undervaluation by the county boards. * * * At the most there have been errors of judgment"); *Chicago Great Western Railway* v. *Kendall*, 266 U.S. 94, 98-99 (1924) ("It is not enough * * * that the taxing officials have merely made a mistake. * * * There must be clear and affirmative showing that

What is challenged here is a systematic approach to assessment deliberately "adopted as a practice." For purposes of the "intentional and systematic" test, this case is thus indistinguishable from *Cumberland Coal Co.* v. *Board of Revision, supra.* There, the Court concluded that a tax assessor's policy of arriving at a single valuation figure for all coal property in the jurisdiction, despite differences in value, constituted intentional and systematic discrimination in violation of the Fourteenth Amendment:

> There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method, but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. [284 U.S. at 25 (citations omitted).]

So too here there is no question that the challenged assessments were made "pursuant to a deliberately adopted system." It is undisputed that the Assessor, adhering to the "welcome stranger" approach, valued recently-conveyed property at the value declared in the deeds, without raising the assessment of comparable property to that level. Even the three majority justices below acknowledged that this was "the policy of the assessor's office during the relevant time period" and that "this method was uniformly followed." Pet. App. 6a. Again, as in *Cumberland Coal*, this is not a case of "mere errors in judgment"; the policy adopted by the Assessor substituted for any exercise of judgment.

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the difference is an intentional discrimination and *one adopted as a practice*") (emphasis supplied).

See also Weissinger v. *Boswell*, 330 F. Supp. 615, 622 (M.D. Ala. 1971) (three-judge court) ("this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of [the assessors] to perform their duties in accordance with state law").

To establish a violation of the Equal Protection Clause, petitioners need not show that the Assessor and the County Commission were actuated by evil motives or bad faith, or that they deliberately manipulated the data on which the assessments were based. That is not what the "intentional and systematic" test requires. As the Court noted in *Cumberland Coal*, discrimination is none the less systematic and intentional "because of belief in its validity." 284 U.S. at 25.[22]

In any event, the record in this case establishes that the discriminatory assessments were not only intentional and systematic, but purposeful as well. The sheer magnitude of the discrimination in assessments belies any argument that the disparities were somehow not intended by the local elected officials, who chose to adopt this "plan of assessment" rather than follow the appraisal guide issued by the State Tax Commissioner, or engage in *any* actual appraisal of property in the County.[23] As one court noted in striking down a taxing scheme under which the complainant's property was assessed at 143 percent the level of comparable property—as opposed to the more than 3,500 percent at issue here—"overvaluation of property may be so excessive and made under such circumstances as to justify the conclusion that it was not honestly made

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[22] *See, e.g., Sparks* v. *McCluskey*, 84 Ariz. at 286-287, 327 P.2d at 297 ("There is no necessity of proving actual fraud. * * * [I]f the result of these intentional acts is discrimination the assessments cannot stand irrespective of honest motives"); *Ernest W. Hahn, Inc.* v. *County Assessor*, 92 N.M. at 613, 592 P.2d at 969 ("good faith alone will not justify an assessment which is discriminatory in fact").

[23] The Circuit Court found that after the Assessor received the Tax Commissioner's appraisal guide, "it was placed in a drawer where it remained unused and abandoned until the day of the hearing." Pet. App. 34a. That court further found that the Assessor never conducted or relied upon any actual appraisals. *See* Pet. App. 30a. A deliberate choice was made to employ the "welcome stranger" approach instead.

and was known to be excessive." *In re Chicago Railways*, 175 F.2d 282, 291 (7th Cir.), *cert. denied*, 338 U.S. 850 (1949).[24]

Nor can it be overlooked that the assessment scheme deliberately adopted by the Webster County officials—and adhered to even though the dramatic disparities were "repeatedly brought to the attention of the assessor and the Board of Equalization and Review over the ten year period involved," Pet. App. 40a-41a—shifts the property tax burden from long-term, established property owners to newcomers to the County. As might be expected, and as the Circuit Court here found, when property assessment lies in the hands of elected assessors and county commissioners, patterns of inequality may well tend to hurt newcomers to the county or corporate land-owners, and to serve the interests of the "friends and neighbors" of the taxing officials. Pet. App. 40a. Thus, the discrimination evidenced in this case is as offensive as it is irrational.[25]

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[24] *See also Savage* v. *State Tax Comm'n*, 722 S.W.2d 72, 79 (Mo. 1986) (en banc) (160 percent disparity "so grossly excessive as to be entirely inconsistent with an honest exercise of judgment"); *United States* v. *City of Manassas*, 830 F.2d 530, 534 n.5 (4th Cir. 1987) (striking down state tax scheme as discriminatory against United States, noting that "we must question whether a state with such a taxing scheme can truly be said not to intend any discrimination * * *, in light of the maxim that every man is considered to intend the natural and probable consequences of his acts, which is yet in vogue in civil cases"), *aff'd*, 56 U.S.L.W. 3737 (U.S. April 26, 1988); Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Tex. L. Rev. 885, 910 n.110 (1973) ("discriminatory intent [in property tax assessment] may be implied from the magnitude of the discrimination"). In an opinion below during injunctive proceedings in this case, Justice Neely stated that "the gross overassessment of the taxpayer's property indicates constructive fraud." *State ex rel. Ayers* v. *Cline*, 342 S.E.2d 89, 96 (W. Va. 1985) (dissenting opinion).

[25] The State has thus far made no effort to justify the dramatic disparity shown on the record, and the court below cited no justification. It is difficult to imagine what legitimate state purpose the discrimination could promote, given the requirement under state law that *all* property be taxed in proportion to its actual value. In addition, this Court has held that it is not a legitimate purpose for States to favor long-term over short-term residents, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982), and that the States are not free to tax the property of non-residents when they do not tax identical property owned by residents. *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968). Favoring long-term property owners over new owners raises the same concerns of parochial discrimination and cannot be considered a legitimate purpose, particularly when state law expressly mandates equal treatment. *See Lyng* v. *International Union, UAW*, 108 S. Ct. 1184, 1192 n.8 (1988) ("if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest") (emphasis in original).

The discrimination resulting from Webster County's deliberately adopted policy is of historic magnitude. This Court has struck down discriminatory practices that taxed the complainants' property at twice the level of comparable property. *Cumberland Coal*, *supra*; *Sioux City Bridge*, *supra*. Other courts, properly applying this Court's principles, have struck down state taxing schemes yielding even smaller disparities. *See, e.g.*, *Louisville & Nashville R.R.* v. *Public Service Comm'n*, 631 F.2d 426 (6th Cir. 1980) (complainant taxed at 158 percent level of comparables), *cert. denied*, 450 U.S. 959 (1981); *Weissinger* v. *Boswell*, *supra* (177 percent); *Savage* v. *State Tax Comm'n*, *supra* (160 percent).[26] Here the disparities in assessment between petitioners' property and comparable property ranged from *800 to 2000 percent* for Oneida-Shamrock and from *3200 to 3500 percent* for Allegheny Pittsburgh and East Kentucky Energy.

The record plainly establishes that the enormous disparities in assessment in Webster County resulted from a

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[26] *See also Duval* v. *City of Manchester*, 111 N.H. 375, 286 A.2d 612 (1971) (130 to 200 percent); *Bettigole* v. *Assessors of Springfield*, 343 Mass. 223, 178 N.E.2d 10 (1961) (170 percent).

deliberately adopted system. The legal conclusion of the court below to the contrary—unexplained and inexplicable—cannot be permitted to stand.

III. Petitioners Cannot Be Relegated To Attempting To Raise The Assessments Of Others

The court below rested its holding that there was no constitutional violation in part on the blithe assertion that state law afforded a remedy for "[a]ny dispute [petitioner has] with the assessment of other landowners in Webster County * * *." Pet. App. 8a. According to the court below, petitioners could not seek to have their assessments lowered to prevailing levels, but were free to cure any unconstitutional discrimination by attempting to have the assesments of all *other* taxpayers *raised*. Quoting from a recent decision of its own, the court concluded that " 'taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value*. Instead, they should seek to have the assessments of other taxpayers raised to market value.' " [27]

In announcing the availability of this "remedy," the majority ignored the finding of the Circuit Court that petitioners had repeatedly, for ten years, sought action by the Assessor and the County Commission to remedy the undervaluation of neighboring properties, and that "the assessor and Board of Equalization and Review, have just as consistently and repeatedly refused to equalize petitioners[']assessment downward *or to equalize the real estate assessments of others upward*, though petitioners[] have requested relief in both directions." Pet. App. 41a (emphasis supplied).

In any event, this Court has unambiguously held, in a series of unanimous opinions authored in turn by Chief Justices Taft and Hughes and Justices Brandeis and

[27] Pet. App. 9a (quoting *Killen* v. *Logan County Comm'n*, 295 S.E.2d at 709) (emphasis in decision below).

Douglas, that taxpayers who suffer unconstitutional discrimination through the relative overassessment of their property cannot be relegated to seeking to raise the assessments of other taxpayers. In *Sioux City Bridge* v. *Dakota County*, *supra*, county assessors assessed a company's property at 100 percent of its true value, while assessing all other property at 55 percent. The Nebraska Supreme Court, like the court below in this case, held that "when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced." 105 Neb. 843, 848, 182 N.W. 485, 487 (1921). This Court unanimously reversed. Chief Justice Taft, writing for the Court, concluded that the result reached by the Nebraska Supreme Court would effectively deny the injured taxpayer any remedy at all.

> This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. [260 U.S. at 446.]

In *Cumberland Coal*, *supra*, this Court repeated Chief Justice Taft's holding quoted above in a unanimous opinion delivered by his successor, Chief Justice Hughes. The Court rejected the view of the Pennsylvania Supreme Court that the owners of coal-bearing land had no standing to complain about the assessments of other properties so long as their own land was not assessed in excess of its fair market value. *See* 284 U.S. at 28.

The same Term, the "remedy" espoused by the Supreme Court of Appeals of West Virginia in this case

again was rejected by this Court. In *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, the Court upheld the right of the petitioners to obtain refunds of state property taxes based on discrimination in the tax rates applied to shares of stock in national banks as compared to the rates levied against shares of competing domestic corporations. Justice Brandeis, speaking for a unanimous Court, observed that "[i]t may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors." 284 U.S. at 247. But where the State has not taken any such prompt corrective action, and the disfavored taxpayer seeks relief in court, it is not enough to say that the taxpayer may seek to raise the taxes of others:

> [I]t is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid * * *. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. [*Id.*]

Again, in *Hillsborough* v. *Cromwell*, *supra*, a unanimous Court held that a state remedy that restricted the complaining taxpayer to proceedings to raise the taxes of others "is not adequate to protect [the taxpayer's] rights under the federal Constitution." 326 U.S. at 624. The Court acknowledged that the right at issue was the right to equal treatment, and that the taxpayer could not object if equality were achieved by raising the taxes of others rather than lowering his own. "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes

of other members of the class." *Id.* at 623 (citing cases).[28]

Contrary to respondent's contention, *Louis K. Liggett Co.* v. *Lee*, *supra*, does not support the decision below. *See* Resp. Br. in Opp. 15. The taxpayer's claim in that case was that a few taxpayers were avoiding paying any tax, because of dereliction of duty by the tax collectors, not that it paid taxes at a discriminatory level compared to all other taxpayers. 288 U.S. at 539. Indeed, the Court expressly reaffirmed the principles applicable to a case such as the present one: "[I]n the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever." *Id.* at 540.

As in any case of an equal protection violation, the State can cure the discrimination for the future by either raising the assessments of the favored taxpayers, or lowering those of petitioners. That is entirely up to the State. The State may not, however, deny the right of those discriminated against to secure "a *mandate* of equal treatment," regardless of the future remedial steps it may or may not take. *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original) (relying upon *Iowa-Des Moines National Bank* v. *Bennett*, *supra*). The principle is no different from that applied in this Court's decisions that have recognized the right of those discrimi-

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[28] Although petitioners relied heavily upon these precedents before the West Virginia Supreme Court of Appeals, that court did not distinguish this Court's decisions, or even cite them. Nor has respondent explained why these decisions are not controlling, confirming instead that "it is the settled law of the State of West Virginia that if a taxpayer[']s property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other assessments to be raised and he is not entitled to have it lowered." Resp. Br. in Opp. 14.

nated against by underinclusive statutes to challenge the disparate treatment, even if the remedy is not to extend the benefits to the claimants but to withhold them from all.[29]

In addition, more than the future is at stake here. Petitioners' timely challenges to the discriminatory assessments of their property go back more than ten years, and it is not possible to remedy that past discrimination —challenged in a timely manner—by raising the assessments of all others who may have owned property in Webster County at any time within the past decade. Nor is such a "remedy" any more realistic with respect to the present. The impracticality and cost of one or a few disfavored taxpayers attacking and trying to raise the assessments of *all* others in the county, with the others presumably free to come into court and defend their assessments, case by case, led this Court to conclude unanimously that "it is plain that [such a] state remedy is not adequate to protect [the taxpayer's] rights under the federal Constitution." *Hillsborough* v. *Cromwell*, 326 U.S. at 624.

In any event, it is clear that any such remedy is not adequate or available in *this* case. As the Circuit Court found, "the inequality of the assessment of petitioners' real estate and that of comparable tracts has been repeatedly brought to the attention of the assessor and Board of Equalization and Review over the ten year period involved." Pet. App. 40a-41a. Despite petitioners' efforts, the county officials "have just as consistently and repeatedly refused to equalize petitioners[']assessment downward or to equalize the real estate assessments of others upward, though petitioners[] have requested relief in both directions." Pet. App. 41a. Thus, even if a State

[29] *See, e.g., Heckler* v. *Mathews, supra*; *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Califano* v. *Webster*, 430 U.S. 313 (1977).

could relegate a taxpayer to attempting to raise the assessments of all others—contrary to this Court's unanimous decisions in *Sioux City Bridge*, *Cumberland Coal*, *Iowa-Des Moines National Bank*, and *Hillsborough*—petitioners have undertaken such an effort, and have been rebuffed.

The chimerical nature of such a "remedy" is confirmed by considering what it would entail. The property taxes of all others in the county would need to be increased, on average, by a factor of 35 to ensure equal treatment with petitioners.[30] As the Circuit Court concluded, "[s]hould uniformity of taxation be attempted through an increase of the assessment of Webster County real estate to the level of that of petitioners, * * * it seems probable that individual ownership of real estate of the nature owned by the petitioners would shortly disappear except for those of great wealth." Pet. App. 44a. The Circuit Court considered raising the assessments of all others, but decided to lower those of petitioners instead. Whatever assessment policies are adopted by Webster County for the future, petitioners cannot be barred from obtaining relief for past discrimination and from securing the "*mandate* of equal treatment" to which they are entitled. *Heckler* v. *Mathews*, 465 U.S. at 740 (emphasis in original).

* * * *

This case is brought by companies that can afford to challenge the discriminatory treatment being employed against them. But the discriminatory system adopted by

[30] The Circuit Court calculated the increases that would be necessary to raise specific comparable neighboring parcels to Oneida-Shamrock's level of assessment. To cite just a few specific examples, a parcel of property currently assessed at $35,310 would need to be increased to $605,147.99, another currently assessed at $21;,689.38 would need to be increased to $3,630,405.40, and a third currently assessed at $28,622 would need to be increased to $490,411.95, just to be treated on a par with Oneida-Shamrock's property. *See* EKE Pet. App. 61a-62a & chart at EKE Pet. 9.

Webster County is not only applied to corporations. Individuals and families buying their first or new homes in Webster County are equally subject to the "welcome stranger" treatment, often in situations in which they cannot afford the disproportionate tax but also cannot afford to mount an attack on its constitutionality. Petitioners are thus "stand-ins" for untold numbers of new homeowners—or those who wish they could be.[31] The dual system of assessment adopted by the Webster County Assessor constitutes "an intentional violation of the essential principle of practical uniformity" in real property taxation, in contravention of the Equal Protection Clause. *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. at 447. We respectfully submit that for all those affected by this unfortunate discrimination, the judgment below should be reversed.

[31] *See generally* Brief Amicus Curiae of the National Association of Realtors in Support of Petitioners.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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